

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Petition of Feature Group IP for Forbearance
from Section 251(g) of the Communications
Act and Sections 51.701(b)(1) and 69.5(b) of
the Commission's Rules

WC Docket No. 07-256

In the Matter of

Petition of Embarq for Forbearance from
Section 69.5(a) of the Commission's Rules,
Section 251(b) of the Communications Act,
and Commission Orders on the ESP
Exemption

WC Docket No. 08-8

COMMENTS OF VERIZON

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February 19, 2008

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INTRODUCTION AND SUMMARY

The Voice-over-IP ("VoIP") services at issue in these two petitions are jurisdictionally mixed, but inseparable, services subject to the Commission's exclusive jurisdiction. Therefore, the same pro-competitive, pro-investment principles that the Commission has applied to broadband services generally should also apply to VoIP services. VoIP is a revolutionary technology that departs in many ways from traditional, circuit-switched telephony. It offers consumers and businesses a suite of integrated features and capabilities, ranging from real-time calling feature management to rich multimedia features, in conjunction with voice

¹ The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

communications. VoIP also reshuffles traditional conceptions of location-based and device-based phone numbers, including by enabling customers to have a single number that reaches them, no matter where they are and what phone (or computer) they are using. The packet-based technology underlying all of these integrated features and capabilities, moreover, enables the further development and deployment of innovative communications applications over broadband platforms.

As Verizon has explained elsewhere,² the Commission should confirm that states do not have jurisdiction over VoIP services; as the Commission has noted, it is crucial that all providers of VoIP services be subject to uniform regulatory policies. In conflict with the Commission's exclusively federal and uniform regulation of broadband and VoIP services, however, Feature Group IP's petition seeks to subject all VoIP traffic to 47 U.S.C. § 251(b)(5) and, thereby, to give more than 50 different state public utilities commissions responsibility for intercarrier compensation policy with respect to VoIP traffic. For that reason alone, the Commission should deny Feature Group IP's petition. It is in the public interest for the Commission to retain its exclusive jurisdiction over VoIP services – which enables it to further its national and uniform broadband policy – rather than subjecting those services to state regulation of reciprocal compensation rates.

Feature Group IP's forbearance petition has three core failings that require dismissal or denial of its petition. First, Feature Group IP seeks forbearance from statutory provisions and regulations that do not, in fact, apply to its services. Under the Act, Feature Group IP cannot ask the Commission to forbear from rules that apply only to *other* carriers. Second, Feature Group

² Verizon Ex Parte Letter to Chairman Martin, *IP-Enabled Services*, WC Docket No. 04-36 (filed Aug. 6, 2007).

IP assumes that granting its petition would result in VoIP and other IP-to-PSTN calls automatically being subject to reciprocal compensation under § 251(b)(5) or the Commission's ISP intercarrier payment regime. The Commission rejected that same claim in denying a similar forbearance petition, holding that those provisions would *not* automatically expand to cover the traffic subject to the petition. Instead, the result Feature Group IP seeks would require further affirmative, rulemaking action on the Commission's part. Feature Group IP's requested relief, therefore, is beyond the scope of what the Commission can accomplish through forbearance. Finally, as noted above, Feature Group IP's petition fails the third prong of the statutory forbearance standard because it would be contrary to the public interest to grant the petition under current circumstances.

The Commission should also deny Embarq's forbearance petition. It is not in the public interest for the Commission to address intercarrier compensation for VoIP traffic in a piecemeal fashion, which is all that forbearance permits the Commission to do. Granting Embarq's forbearance petition would not settle the disputes giving rise to that petition, as well as to Feature Group IP's petition. A narrow forbearance holding on the ESP exemption would not end the confusion and controversy in the industry as to the nature of this traffic and the compensation treatment that applies. A limited ruling on Embarq's petition, therefore, is not in the public interest unless the Commission addresses intercarrier compensation for VoIP traffic more comprehensively – something it cannot do in the context of a forbearance petition. The complexities in this area and the potential need for new rules to create a coherent and comprehensive intercarrier compensation regime for VoIP traffic demonstrate that the public interest is better served by the Commission addressing these issues through a different, more appropriate, procedural mechanism.

DISCUSSION

I. THE COMMISSION SHOULD DISMISS OR, IN THE ALTERNATIVE, DENY FEATURE GROUP IP'S FORBEARANCE PETITION

Although captioned as a petition for forbearance, the focus of Feature Group IP's petition is its request for a declaratory ruling that VoIP-originated calls that terminate to the PSTN are never subject to access charges under the Commission's current rules, but instead are subject to reciprocal compensation or the *ISP Remand Order*³ payment regime.⁴ In the alternative, Feature Group IP seeks forbearance from various statutory provisions and Commission rules in order to achieve the same result.⁵ The statutory deadline in Section 10 applies *only* to Feature Group IP's alternative request for forbearance.⁶ The Commission, therefore, has no obligation to address Feature Group IP's request for a declaratory ruling at the same time it rules on the forbearance request; instead, the declaratory ruling request is subject to the Commission's normal discretion over whether and when it should act on such petitions.⁷

³ Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") (subsequent history omitted).

⁴ See Feature Group IP Pet. at 3 ("If the Commission reaffirms these principles, it can deny this Petition.").

⁵ See *id.* at 3-4 (contending that, if VoIP-originated calls "are not exempt from access charges, . . . then the Commission must forbear").

⁶ See, e.g., 47 U.S.C. § 160(c) (providing that "any such petition" – that is, a "petition . . . requesting that the Commission exercise the [forbearance] authority granted under this section" – "shall be deemed granted" if not denied within the time, and for the reasons, specified in the statute); Memorandum Opinion and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000, ¶ 31 (2002) ("This request [for a declaratory ruling], unlike SBC's forbearance request, is not subject to a statutory timetable.").

⁷ See, e.g., *Yale Broad. Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973) (finding it "clear" that "the Commission is not *required* to issue such a declaratory statement merely because a [petitioner] asks for one"); Memorandum Opinion and Order, *Communications Vending Corp. of Arizona, Inc. v. Citizens Communications Co.*, 17 FCC Rcd 24201, ¶ 51 n.151 (2002) (noting the

The Commission should dismiss or deny Feature Group IP's alternative request for forbearance. First, Feature Group IP seeks forbearance only from rules that apply to other carriers, not to Feature Group IP. Second, Feature Group IP seeks relief – the application of reciprocal compensation rules to VoIP traffic – that can be accomplished only through rulemaking rather than forbearance. As the Commission recently found with respect to a similar forbearance petition, this flaw compels denial of the forbearance petition. For both these reasons, therefore, Feature Group IP has not filed a *bona fide* forbearance petition, and the Commission must dismiss its petition on that ground. Third, Feature Group IP's forbearance petition is not in the public interest under current circumstances and, therefore, should be denied because it fails to satisfy Section 10(a)(3).

A. Feature Group IP seeks forbearance from the Communications Act and the Commission's rules, insofar as they authorize LECs to charge access charges for VoIP-originated calls that transit Feature Group IP's network and are delivered to customers of those LECs on the PSTN. But the provisions and regulations from which Feature Group IP seeks forbearance apply *only* to LECs that seek to recover their tariffed access charges for such calls, and do *not* apply to Feature Group IP.⁸ Therefore, Feature Group IP cannot petition for forbearance from those provisions and regulations.

Commission's "discretion whether to rule on a petition for declaratory ruling"), *aff'd*, *Communications Vending Co. of Arizona, Inc. v. FCC*, 365 F3d 1064 (D.C. Cir. 2004). Because Feature Group IP's declaratory ruling request is specific to a particular dispute that is being actively litigated between Feature Group IP and AT&T, Verizon takes no position at this time on whether Feature Group IP's request satisfies the Commission's criteria for exercising its discretion to issue declaratory rulings.

⁸ Among other things, the regulations from which Feature Group IP seeks forbearance authorize LECs to file exchange access tariffs, provide that the rates LECs charge for access services are to be governed by the Commission's price cap methodology, prescribe the individual

Section 10 allows “[a]ny telecommunications carrier” to request that the Commission “forbear from applying any regulation or any provision” of the Communications Act “*with respect to that carrier . . . or any service offered by that carrier.*”⁹ Carriers are thus permitted to seek forbearance from rules or provisions that apply to them; a carrier may not, however, seek forbearance from rules that apply only to other carriers.¹⁰ Because Feature Group IP is not the entity regulated by the statutory provisions and rules from which it seeks forbearance, Feature Group IP’s petition is procedurally defective and should be dismissed on that ground.

B. Feature Group IP’s forbearance petition is premised on its belief that forbearance would result in VoIP-originated traffic automatically being subject to a rate regime other than LECs’ tariffed access charges. As an initial matter, Feature Group IP’s petition is not clear on which rate regime would automatically apply to VoIP-originated traffic. In some places, Feature Group IP suggests that VoIP-originated calls would automatically become subject to reciprocal compensation under § 251(b)(5).¹¹ In other places, Feature Group IP suggests that it is the *ISP Remand Order* payment regime that would automatically start to apply to VoIP-originated calls.¹²

rate elements that LECs must charge, and specify to whom LECs must charge the prescribed rates. *See* 47 C.F.R. §§ 69.1(b), 69.3, 69.4, 69.5.

⁹ 47 U.S.C. § 160(a), (c) (emphases added).

¹⁰ A carrier may seek forbearance for a “class of telecommunications carriers” from rules that apply “with respect to . . . those carriers.” 47 U.S.C. § 160(c). The “class,” however, must logically include the carrier (or carriers) filing the forbearance petition. In any event, Feature Group IP explicitly states that it is seeking forbearance only for itself. *See* Feature Group IP Pet. at 11 (“This particular [f]orbearance request is also limited to those communications that traverse Feature Group IP’s Internet Gateway Intermediation Point of Presence . . . services.”).

¹¹ *See, e.g.,* Feature Group IP Pet. at v, 17.

¹² *See, e.g., id.* at v, 30.

Feature Group IP's apparent confusion on this issue, however, is ultimately irrelevant. Neither regime would *automatically* apply to VoIP-originated calls if the Commission were to grant Feature Group IP's forbearance petition. That is because, to put in place a *new* rate regime for IP-PSTN calls – which is the premise of the forbearance request – the Commission would have to engage in *rulemaking*. Feature Group IP's requested relief is therefore unavailable through forbearance.

Indeed, Feature Group IP's claim here is indistinguishable from Core's recent argument that granting forbearance from 47 U.S.C. § 251(g) and various Commission regulations would result in all traffic exchanged between carriers being subject to reciprocal compensation under § 251(b)(5). The Commission rejected that claim, holding that “the section 251(b)(5) reciprocal compensation regime would not automatically, and by default, govern traffic that was previously subject to [access charge rules].”¹³ The Commission went on to explain that, if it “were to forbear from the rate regulation preserved [in the access charge regime], there would be no rate regulation governing the exchange of traffic currently subject to the access charge regime.”¹⁴ Accordingly, Core was asking the Commission to implement a new rule rather than simply to forbear from the application of an existing rule. The Commission found that, for that reason

¹³ Memorandum Opinion and Order, *Petition of Core Communications, Inc. for Forbearance from Sections 251 (g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 14118, ¶ 14 (2007) (“*Core 251/254 Forbearance Order*”), petition for review pending, *Core Communications, Inc. v. FCC*, No. 07-1381 (D.C. Cir.); see also First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 1032-1034 (1996) (“*Local Competition Order*”).

¹⁴ *Core 251/254 Forbearance Order* ¶ 14.

alone, Core's forbearance petition should be denied;¹⁵ the Commission should reach the same result here.¹⁶

Nor are matters different with respect to the *ISP Remand Order* payment regime, as modified by the (first) *Core Forbearance Order*.¹⁷ As the Commission has repeatedly explained, and the courts of appeals have found, that payment regime applies only to a limited class of calls – namely, dial-up, narrowband calls originated on the PSTN and bound for a locally-situated ISP in order to access the Internet – and does not apply, for example, to calls made to ISPs in distant local calling areas.¹⁸ “In addressing compensation” in the *ISP Remand Order*, “the Commission was focused on calls between dial-up users and ISPs in a single local calling area.”¹⁹ It follows

¹⁵ *Id.* (“Due to the absence of any . . . rate regulation if forbearance were granted, we cannot conclude that enforcement of the rate regulation preserved by section 251(g) . . . is not necessary to ensure that charges and practices are just and reasonable.”).

¹⁶ The Commission reached a similar conclusion in rejecting the forbearance petition of Fones4All Corp., which sought to use forbearance as a mechanism for imposing UNE requirements on third parties. See Memorandum Opinion and Order, *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundles Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Assistance*, 21 FCC Rcd 11125, ¶¶ 7-8 (2006), petition for review pending, *Fones4All Corp. v. FCC*, No. 06-75388 (9th Cir.). Because the petition “s[ought] to use the section 10 forbearance provision to create new section 251 unbundling obligations,” the Commission “conclude[d] that forbearance . . . would not give the Petitioner the relief it seeks,” and “den[ied] the petition as procedurally defective.” *Id.* ¶ 7.

¹⁷ Order, *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, 19 FCC Rcd 20179 (2004), petitions for review denied, *In re Core Communications*, 455 F.3d 267 (D.C. Cir. 2006).

¹⁸ See Opposition of FCC to Pet. for Writ of Mandamus at 26, *In re Core Communications, Inc.*, No. 07-1466 (D.C. Cir. filed Dec. 27, 2007) (“*Core Mandamus Br.*”) (“[T]he *ISP Remand Order* addressed only those calls to ISPs ‘within the caller’s local calling area.’”) (quoting *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Cir. 2002)); see also *Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59, 65 (1st Cir. 2006).

¹⁹ Br. for Amicus Curiae FCC at 12, *Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59 (1st Cir. 2006) (No. 05-2657) (filed Mar. 14, 2006).

that the *ISP Remand Order* payment regime does not apply of its own force to an entirely different kind of traffic – calls that VoIP providers originate that are then delivered to the PSTN – and would not automatically apply to such calls if the Commission were to grant Feature Group IP’s forbearance petition. Instead, the Commission could extend the *ISP Remand Order* payment regime to IP-PSTN traffic (or some other type of traffic) only through rulemaking, not forbearance.

C. Feature Group IP’s petition also fails the third prong of the statutory forbearance provision because, at a minimum, subjecting VoIP to more than 50 states’ different reciprocal compensation regulations is contrary to the public interest. If all VoIP-originated calls were subject to reciprocal compensation pursuant to § 251(b)(5) – as Feature Group IP claims they would be if its petition were granted – the Commission would have ceded significant authority over this broadband service to more than 50 state commissions. Under the 1996 Act, although the Commission has authority to establish the “requisite pricing methodology, . . . the States . . . apply those standards and implement that methodology, determining the concrete result in particular circumstances.”²⁰ Because § 251(b)(5) is designed to be implemented on a state-by-state basis pursuant to the standards of § 252(d)(2) and the Commission’s regulations, subjecting all VoIP traffic to reciprocal compensation could give states substantial discretion to establish rates for traffic that has previously been within the Commission’s exclusive control.

Such a shift would disrupt the Commission’s efforts to establish a national and uniform set of regulations to govern VoIP traffic, and would be inconsistent with the pro-competitive, pro-innovation policies that the Commission has adopted for broadband generally. The

²⁰ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999).

Commission has emphasized that the “regulatory certainty”²¹ created by exclusive federal jurisdiction over VoIP services “clears the way for increased investment and innovation”²² in such services and is critical for their continued development. And the Commission’s concern that subjecting VoIP services to the varying regulations of more than 50 states would deprive consumers of significant benefits was part of its justification for preempting state regulation in the *Vonage Order*. As the Commission noted, VoIP “facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet.”²³ It would be contrary to the public interest for the Commission to reverse its national approach to VoIP services by granting Feature Group IP’s forbearance petition.²⁴

II. THE COMMISSION SHOULD DENY EMBARQ’S FORBEARANCE PETITION

Embarq seeks forbearance from application of the ESP exemption to the same VoIP-originated calls that are the subject of Feature Group IP’s forbearance petition.²⁵ As an initial matter, Embarq errs insofar as it suggests that VoIP is no different from traditional circuit-switched phone calls.²⁶ On the contrary, VoIP is different in a critical respect for jurisdictional

²¹ Memorandum Opinion and Order, *Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm’n*, 19 FCC Rcd 22404, ¶ 1 (2004) (“*Vonage Order*”), *aff’d*, *Minnesota Pub. Utils. Comm’n v. FCC*, 438 F.3d 570 (8th Cir. 2007).

²² *Id.* ¶ 2.

²³ *Id.* ¶ 37.

²⁴ Because the three forbearance criteria “are conjunctive,” the Commission can “properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied” without reaching the other two criteria. *Cellular Telecomm. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (“*CTIA*”).

²⁵ See Embarq Pet. at 5-6; *cf.* Feature Group IP Pet. at 3 (seeking declaration that ESP exemption applies to VoIP traffic).

²⁶ See Embarq Pet. at 10-11 & n.27.

purposes. As the Commission previously found, VoIP makes possible the provision of a suite of integrated features and capabilities – and provides opportunities for the development and deployment of additional features and capabilities – that are unavailable through the traditional PSTN. The Commission also recognized that the various types of VoIP services being deployed, including facilities-based VoIP services, appear to share these basic characteristics.²⁷ VoIP, moreover, “driv[es] consumer demand for broadband connections, and consequently encourag[es] more broadband investment and deployment.”²⁸ Therefore, as discussed at the outset, VoIP is qualitatively different from circuit-switched service and, as such, is within the Commission’s exclusive, federal jurisdiction and its uniform, national deregulatory paradigm for such broadband services.

Turning to the merits of Embarq’s forbearance request, the Commission should find that, because of the limitations inherent in the forbearance process, it would be contrary to the public interest for the Commission to address intercarrier compensation for VoIP traffic through forbearance in the manner Embarq proposes. In an area as complex and multifaceted as this, actions the Commission takes with respect to one aspect of its intercarrier compensation rules could require other countervailing changes to avoid creating arbitrage opportunities. Forbearance is an inadequate mechanism to make those countervailing changes, because – as the Commission has held²⁹ – granting forbearance does not result in the automatic imposition of any particular compensation scheme. Nor does it enable the Commission to engage in the reasoned rulemaking required to address these complex issues on a comprehensive basis. Instead, further

²⁷ *Vonage Order* ¶ 32.

²⁸ *Id.* ¶ 36.

²⁹ *See Core 251/254 Forbearance Order* ¶ 14; *see also* Part I.B.

clarification or rationalization of the intercarrier compensation rules with respect to VoIP traffic must come through additional procedures, such as the Commission promulgating further regulations.³⁰

Granting Embarq's narrow forbearance petition would not settle underlying disputes among carriers regarding the intercarrier compensation rules applicable to VoIP-originated calls. To the contrary, the controversy in the industry as to the nature of this traffic and the compensation treatment that applies would continue, and there would likely be further uncertainty and disputes over the effect of granting forbearance. As a result, a narrow ruling on Embarq's petition would not be in the public interest. Instead, the Commission should address the issue of intercarrier compensation for VoIP traffic in its entirety – something the Commission cannot achieve in the context of a forbearance petition. The Commission, therefore, should deny Embarq's petition on the ground that the public interest is not served by granting Embarq's petition, but instead is best served by the Commission addressing intercarrier compensation for VoIP traffic in a comprehensive manner and through procedural mechanisms that permit the Commission to adopt a comprehensive solution.

³⁰ Embarq, however, is correct insofar as it explains that the ESP exemption is a narrowly-crafted policy designed to apply in one particular circumstance – where ESPs obtain access to the local exchange in order to sell their services to PSTN customers – that bears no resemblance to VoIP communications, in which the PSTN customer that receives a VoIP-originated call has no relationship with the VoIP provider or other companies (like Feature Group IP) involved in transporting that call to the PSTN.

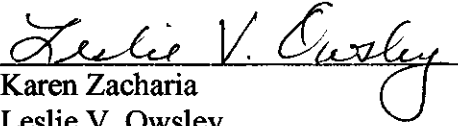
CONCLUSION

For the foregoing reasons, the Commission should dismiss or, in the alternative, deny Feature Group IP's petition for forbearance. The Commission should also deny Embarq's petition for forbearance.

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